

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH HINES III,

Defendant-Appellant.

UNPUBLISHED

September 11, 2007

No. 271154

Wayne Circuit Court

LC No. 06-001959-01

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the first-degree felony murder conviction and 420 to 840 months' imprisonment for the second-degree murder conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We vacate defendant's conviction and sentence for second-degree murder, but affirm his remaining convictions and sentences.

Defendant first argues that the trial court abused its discretion in admitting a portion of defendant's recorded telephone call from jail as rebuttal evidence. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(b). "Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (citations omitted). "As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Id.*

As defendant argues, a "prosecutor cannot elicit a denial during the cross-examination of a defense witness and use such denial to inject a new issue into the case." *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991). We agree that the recorded telephone conversation was not properly classified as rebuttal evidence because it did not respond to evidence presented by defendant. However, even if not properly admitted as rebuttal evidence, defendant's previous statement was admissible as extrinsic evidence of his prior inconsistent statement. MRE 613(b).

The question of credibility is always in issue. Before defendant testified, the prosecutor agreed not to offer the recorded conversation as evidence, but expressly reserved the right to use the evidence for impeachment if defendant testified inconsistently at trial. Defendant gave testimony that was contradicted by the telephone conversation. Under the circumstances, the trial court did not abuse its discretion in allowing a portion of the recorded conversation to be introduced to impeach defendant's trial testimony. *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005).

We reject defendant's claim that reversal is required because of judicial bias. Because defendant did not object to the trial court's conduct or otherwise raise this issue below, the issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality. Where a judge forms opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or impartiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible. Comments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999) (citations omitted).

Defendant contends that two separate exchanges involving the trial court demonstrate that the court was biased against him. The first exchange occurred during a pretrial hearing in which the court made some general comments about the high number of murder trials it had been conducting recently, which the court referred to as a "sad time in the history of our community." It is apparent from the trial court's remarks that the court was offering general commentary on the types of cases it had been handling recently. The remarks were not directed at defendant's case specifically, and nothing in the remarks can be construed as an opinion by the court on defendant's guilt or innocence. Indeed, the court accurately remarked that defendant had only been "accused of killing someone." Nothing in the court's remarks demonstrate bias or impartiality against defendant.

The second exchange challenged by defendant involves the trial court's statements made while reinstructing the jury after deliberations began. Defendant attempts to challenge isolated portions of the trial court's statements during reinstruction to support his claim of bias. We find no merit to this issue. The trial court's statement that the decedent died of a single gunshot wound to the abdomen was made in the context of explaining what elements the prosecutor was required to prove beyond a reasonable doubt to prove second-degree murder. The statement could not be interpreted as a statement of the trial court's personal opinion about the facts of the case, nor does it appear to have been intended to convey that the manner of death was an established fact. Further, the trial court's instructions fairly informed the jury that it was up to it to decide how long to spend deliberating on the principal charge of second-degree murder before considering the lesser offense of manslaughter, and whether to go back to considering the higher offense after considering the lesser one. *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). There is no indication of bias in the trial court's instructions.

Next, defendant argues that he was denied a fair trial because of the prosecutor's misconduct. Because defendant did not object to the prosecutor's conduct at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

A prosecutor is afforded great latitude in closing argument, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and may use strong and emotional language in making her argument so long as it is supported by the evidence, *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Viewed in context, the prosecutor did not improperly attack defense counsel, but rather urged the jury to remain focused on the evidence and not to be distracted by argument or irrelevant matters. The prosecutor's remarks did not constitute plain error.

Further, the prosecutor did not improperly ask defendant to comment on the veracity of the prosecution's witnesses when cross-examining defendant. Instead, the prosecutor properly was attempting to determine whether defendant's version of the facts was different and to ascertain which facts were in dispute. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

We also reject defendant's argument that the prosecutor improperly appealed to the sympathy of the jury. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). The essence of the prosecutor's remarks were that the jury should disregard sympathy altogether. Thus, there was no plain error. And, because the prosecutor's conduct was not improper, defense counsel was not ineffective for failing to object to the prosecutor's conduct at trial. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (defense counsel is not required to make futile objections).

Finally, we agree with defendant that, because he was convicted of first-degree felony murder, his conviction and sentence for second-degree murder, arising from the death of a single individual, must be vacated because it violates his protections against double jeopardy. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

In sum, we vacate defendant's conviction and sentence for second-degree murder, and affirm his remaining convictions and sentences.

Affirmed in part and vacated in part. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray